

**EXHIBIT B**

Page 1

1 UNITED STATES BANKRUPTCY COURT  
2 DISTRICT OF DELAWARE

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5 In re: :  
6 : Chapter 11  
7 :  
8 FRESH & EASY, LLC : Case No. 15-12220  
9 :  
10 Debtors. : (Joint Administration  
11 :  
12 \_\_\_\_\_ : Requested)

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United States Bankruptcy Court

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824 North Market Street

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Wilmington, Delaware

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March 3, 2016

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1:37 p.m. - 1:46 p.m.

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21 B E F O R E :

22 HON BRENDAN L. SHANNON

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO OPERATOR: MICHAEL MILLER

Page 2

1 HEARING re Debtor's Motion for an Order, Pursuant to  
2 Sections 105 and 363 of the Bankruptcy Code, (I) Authorizing  
3 the Debtor to Enter into That Certain Second Post-Petition  
4 Services Agreement with Tesco Stores Limited and (II)  
5 Granting Related Relief (Filed February 19, 2016) (Docket  
6 No. 604)

7

8 HEARING re Motion of Darlene Lewis for Class Certification  
9 and Related Relief (Filed January 13, 2016) (Docket No. 466)

10

11 HEARING re Motion for Order Applying Fed. R. Bankr. P. 7023,  
12 Pursuant to Fed. R. Bankr. P. 9014(c), to Motion for Class  
13 Certification and Related Relief (Filed January 13, 2016)  
14 (Docket No. 467)

15

16 HEARING re Motion for Entry of an Order Requiring Certain  
17 Entities to Provide Information Pursuant to Bankruptcy Rule  
18 2004 (Filed February 5, 2016) (Docket No. 568)

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25 Transcribed by: Sonya Ledanski Hyde

Page 3

1 A P P E A R A N C E S :

2

3 FOX ROTHSCHILD

4 Attorney for Creditor's Committee

5

6 BY: L. JOHN BIRD

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8 KOSMOWSKI LAW

9 Attorney for Darlene Lewis

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11 BY: EDWARD J. KOSMOWSKI

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13 YOUNG CONAWAY STARGATT & TAYLOR

14 Attorney for Debtor

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16 BY: SHARON ZIEG

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18 RICHARDS LAYTON & FINGER

19 Attorney for YFE Holdings

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21 BY: JOHN H. KNIGHT

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Page 4

1 UNITED STATES DEPARTMENT OF JUSTICE

2 Attorney for the US Trustee

3

4 BY: NATALIE COX

5

6 COLE SCHOTZ

7 Attorney for the Debtor

8 500 Delaware Avenue, Suite 1410

9 Wilmington, DE 19801

10

11 BY: NORMAN PERNICK

12

13 ALSO PRESENT TELEPHONICALLY:

14

15 AMIR AGAM

16 JOSHUA D. BUCK

17 TOM P. CORRIGAN

18 JESSE A. CRIPPS

19 JACK RAISNER

20 KAHN A. SCOLNICK

21 MAURICE M. SUH

22 MICHAEL A. SWEET

23 DAVID T. VAN PELT

24

25

1 P R O C E E D I N G S

2 THE COURT: Please be seated. Good afternoon.

3 MR. PERNICK: Good afternoon, Your Honor.

4 THE COURT: Mr. Pernick, good to see you.

5 MR. PERNICK: Good to see you, Your Honor. Your  
6 Honor, Norman Pernick for the Debtors, Fresh & Easy. Your  
7 Honor, today it's all about you. I guess it always is all  
8 about you, but today is all about you.

9 THE COURT: That's how I see it.

10 MR. PERNICK: You were kind enough to actually  
11 sign an Order Number One, which was Tesco.

12 THE COURT: Mm hmm.

13 MR. PERNICK: And Number Four, there's actually  
14 two stipulations. Both were submitted on certification of  
15 counsel. You signed one, I think?

16 THE COURT: Right.

17 MR. PERNICK: And there's another one. I don't  
18 know if you have a question or anything.

19 THE COURT: I don't have a question. I thought  
20 that I had signed both, so maybe the other one didn't get to  
21 the docket. If you don't see that by the end of the day,  
22 then give us a call and we'll track it down, but I'm pretty  
23 certain that that's been signed. Ms. Zieg, good to see you.

24 MS. ZIEG: Good afternoon, Your Honor.

25 MR. PERNICK: And then that just leaves the two

## 1      rulings for Two and Three.

2 THE COURT: The classification issues, the class  
3 certification.

4 MR. PERNICK: Mm hmm.

5 THE COURT: Okay, and I'm prepared to proceed on  
6 that.

7 MR. PERNICK: Thank you.

8                   THE COURT: And again, I appreciate everyone's  
9 time and patience with this matter. As we discussed at our  
10 last hearing, I wanted the opportunity to make sure I  
11 understood the applicable case law and how to apply the  
12 tests that the Courts had developed.

13                   So these are Agenda Items Two and Three, and as  
14                   stated, I took under advisement the motion of Darlene Lewis  
15                   for class certification, as well as the motion for an Order  
16                   Applying Rule 7023. These motions seek certification of a  
17                   class that consists of all former Nevada and Arizona  
18                   employees of the Debtor who have not paid their accrued and  
19                   unused PTO wages at the time of their separation of  
20                   employment.

At the hearing on the 18th of February, as noted,  
I did hear an argument from counsel. And I know from the  
record that I'm giving my ruling orally because of the  
nature of the relief requested. And in the context of this  
case, the parties desire for prompt disposition of this

1 matter.

2           And for the reasons that I will share with you, I  
3 will deny the certification motions. Case law teaches that  
4 class claims should be sparingly used in bankruptcy. And  
5 many of the policy considerations that support class actions  
6 are absent in bankruptcy proceedings because the costly  
7 barriers to traditional civil litigation and prosecution of  
8 claims are significantly reduced in bankruptcy by the claims  
9 allowance process.

10           So determining whether to grant class  
11 certification involves two steps. First, the Court must  
12 decide whether to apply Federal Rule 23 to the contested  
13 matter. And if the Court decides that Rule 23 applies, then  
14 the Court has to determine if the punitive class then  
15 satisfies the requirements of Rule 23.

16           And MF Global is probably the leading bankruptcy  
17 court decision in this matter. And then, if and only if the  
18 Court decides to apply Rule 23, does it then determine  
19 whether the requirements of Rule 23 are met? This two-step  
20 process is discussed in MF Global, as well as in the Ephedra  
21 Products case. And both parties have briefed it  
22 extensively.

23           As noted, Bankruptcy Rule 7023 expressly allows  
24 class certification and adversary proceedings by  
25 incorporating Rule 23. And application of Rule 23 is

Page 8

1       extended to contested matters by Bankruptcy Rule 9014, which  
2       then grants the Court discretion to apply Rule 23 to a  
3       contested matter.

4                  And for Bankruptcy Rule 7023 to become applicable,  
5       the Court must specifically find that it applies to the  
6       class claim filing and the objection process. The code of  
7       the Bankruptcy Rules do not specifically direct how a Court  
8       should address its discretion or exercise its discretion in  
9       deciding whether to apply Rule 7023.

10                 And there is a well-developed body of case laws I  
11       noted that suggest the Courts should follow or should  
12       consider the two following factors in determining the  
13       application of 7023. First, whether the class was certified  
14       pre-petition. Second, whether the members of the punitive  
15       class received notice of the bar date in the bankruptcy  
16       proceeding.

17                 And third, whether class certification will  
18       adversely affect the administration of the case. And again,  
19       these are I think well established standards, both recently  
20       or both parties have again cited to the Musicland Holding  
21       Corp. from the Southern District.

22                 In the present case, there was not a class  
23       certified pre-petition, and all employees have received  
24       notice of the bar date. I do note that the failure to  
25       certify a class on a pre-petition basis, while one of the

Page 9

1 considerations, is not fatal, given the circumstances of  
2 this and other cases which show a fairly close nexus in time  
3 between the events giving rise to potential class claims and  
4 the bankruptcy proceeding.

5 But here also, the movement did not file an  
6 adversary proceeding until the 17th of February 2016, which  
7 was the day before the Court held its hearing on the  
8 certification motion. And the record does support a  
9 determination that granting class certification in this case  
10 would adversely impact the administration of the case by  
11 adding unnecessary layers of procedural and factual  
12 complexity.

13 And I acknowledge that this case is only about  
14 four months old, but in the bankruptcy world, this case is  
15 actually well underway and fairly well developed. The bar  
16 date has passed. The Debtor has received final approval to  
17 continue its store closing, a program that is well underway.  
18 And Hilco has been actively liquidating the Debtor's storage  
19 now for several months.

20 Approving class certification at this juncture, I  
21 fear, would disrupt the progress of the case by inevitably  
22 delaying potential distributions to Creditors. The bar date  
23 was February 16, 2016, and the Debtor is in the mix of  
24 reviewing claims. And the Debtor has advised that it will  
25 be moving forward promptly with the claims in allowance and

Page 10

1 objection process.

2 Moreover, I find that entirely switching gears in  
3 this case by granting the certification motion frankly risks  
4 depletion of what I believe are already relatively limited  
5 funds available to Creditors. I make no comment following  
6 our colloquy at the last hearing, as to whether or not this  
7 case may be or may become administratively insolvent.

8 That's not before me today.

9 But based on my experience and the pleadings thus  
10 far, I do believe that it is fair to say that this is not a  
11 case that is flush with cash. And so, in deciding whether  
12 to rule -- apply Rule 7023, the Court must decide and  
13 consider whether the benefit to the class members justifies  
14 the costs to the estate.

15 And again, this is a factor considered both in MF  
16 Global, as well as recently in Ephedra. The cost of the  
17 estate here, I believe, could be substantial, because the  
18 Debtor would have to both defend against the class action,  
19 and frankly likely pay for class claimants counsel fees.

20 Any foreseeable benefit to class members would be  
21 minimal, at least on the facts thus developed in this case.  
22 Keeping the PTO claimants squarely within the claims  
23 allowance process more efficiently disposes of their claims  
24 in an expedited manner.

25 And the Court observes that it is more than

Page 11

1 prepared and more than experienced to afford prompt and  
2 efficient mechanisms to allow those claimants to press their  
3 claims to appear telephonically or otherwise, and again, to  
4 address these issues squarely and quickly.

5 So as noted, keeping them in the claims allowance  
6 process, I think affords an opportunity to dispose of the  
7 claims in an expedited manner. And I note that there's  
8 always a -- there is already an established mechanism that's  
9 in place for notifying the PTO claimants and managing a  
10 large number of different types of PTO claims.

11 And again, it does seem that there are at least  
12 several different flavors of claim for priority. Some of  
13 those claims may be capped, and there may be differences  
14 based upon where the particular claimant or former employee  
15 is based.

16 And so, therefore, based upon the reasons that  
17 I've stated, the Court does find that Rule 23 should not be  
18 applied in this instance. And because Rule 23 does not  
19 apply, I will not need to and do not reach the question of  
20 whether the requirements of Rule 23 have in fact been  
21 satisfied. Are there any questions? Okay.

22 I would ask that the parties confer and promptly  
23 submit an order under certification that's consistent with  
24 my ruling. Mr. Pernick, anything further today?

25 MR. PERNICK: No, Your Honor. Thank you very

Page 12

1 much.

2 THE COURT: All right. Again, I appreciate  
3 everyone's time. I certainly appreciate the argument last  
4 week and the opportunity to study the submissions and to  
5 deal with this issue. And we will stand in recess. Thank  
6 you very much.

7 MS. ZIEG: Thank you.

8 MR. PERNICK: Thank you, Your Honor.

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Page 13

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3                   RULINGS

4                   DESCRIPTION	PAGE	LINE
5                   Certification motions denied	7	2-3

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Page 14

1 C E R T I F I C A T I O N

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3 I, Sonya Ledanski Hyde, certified that the foregoing  
4 transcript is a true and accurate record of the proceedings.

5

6 **Sonya**  
7 **Ledanski Hyde**

Digital signature of Sonya Ledanski  
Hyde  
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Date: 2016.03.10 17:54:00 -05'00'

8 **Sonya Ledanski Hyde**

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25 **Date: March 10, 2016**